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91-5087 (2)

No._____

In The

Supreme Court of the United States

October Term, 1991

MARIO ENRIQUEZ-NEVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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54 pp

QUESTION PRESENTED FOR REVIEW

Whether a pretextual traffic stop—*i.e.*, a stop made under facially legal authority but with the improper intent to search for evidence—is *per se* reasonable under the Fourth Amendment.

No. _____

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PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Mario Enriquez-Nevarez respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 10, 1991.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Mario Enriquez-Nevarez* and numbered Cause No. 90–8462, was entered on April 10, 1991. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 1991. This petition is filed within ninety days after entry of judgment. SUP. CT. R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On January 30, 1990, Albuquerque Police Department detective James Torres saw Petitioner arrive at a house where he and another officer were conducting surveillance. They followed Petitioner from this house to his residence in Albuquerque, from there to a hotel, and then to a bar called the Drift-in Lounge, where Petitioner met Rigoberto Castillo-Olivas (Castillo). Petitioner left the lounge in the blue van he had been driving; Castillo followed him in a blue and white Chevrolet pickup truck with Idaho license plates and a

broken tail light. The detectives followed the vehicles back to Petitioner's home, where Petitioner picked up a New Mexico license plate.

Later Petitioner and Castillo left together in the blue and white truck, with Petitioner driving, and travelled southbound on Interstate Highway 25. The officers followed Petitioner's vehicle for 60–70 miles in an unmarked car, and then contacted a New Mexico state patrolman to stop it. At the time they had the truck stopped, the detectives were outside of Bernalillo County, New Mexico, which is the county in which they had jurisdiction. When asked at trial why he did not stop Petitioner for the broken tail light earlier, detective Torres indicated that it was discouraged, but not prohibited, for officers in an unmarked vehicle to stop drivers. Torres further explained that they had expected Petitioner to go to a "stash" cite 30 miles outside Albuquerque, but that Petitioner had not driven to this location.

Petitioner was cited for driving with a defective tail light and for failing to produce a driver's license. The detectives arrived and asked for permission to search the truck. Officer Torres testified that Petitioner consented to the search, which revealed the presence of a New Mexico license plate under the front seat between Petitioner and Castillo. No narcotics or other incriminating evidence was found in the vehicle. The detectives asked Petitioner if there were narcotics in the truck. Petitioner responded that "people don't take narcotics south; they bring them in from Mexico." Petitioner also told the detectives that he was going to get a bumper and to get bottled sodas in Juarez, Mexico.

The officers believed that an illegal transaction had occurred between Petitioner and a resident of the house under surveillance. However, with the exception of driving with a

broken tail light, the officers had not observed Petitioner engaged in any illegal activity. Although the detectives told Petitioner upon stopping him that they knew he was a narcotics trafficker, no evidence was presented regarding any information the police had about prior criminal or drug-related activity by Petitioner.

On the morning of January 31, 1990, Petitioner, driving the blue and white truck, crossed the border from Juarez into El Paso, Texas at the Paso Del Norte point of entry. At the initial inspection station, United States Customs Inspector Roberto Rodriguez questioned Petitioner. Rodriguez questioned Petitioner as to citizenship and what items he had to declare; Petitioner presented his resident alien card and said that he had purchased a few cases of soda. Rodriguez escorted Petitioner to a secondary inspection station, where Petitioner was questioned by Customs inspectors Enrique Solorzano and Sigidfredo Cordero. Cordero searched the vehicle driven by Petitioner; after a full inspection, no contraband was found.

Castillo crossed the border driving the next vehicle in Inspector Rodriguez's lane, a white Chevrolet pickup, and Rodriguez questioned him at the primary inspection station. Rodriguez then inspected the gas tank through a crack between the bed of the truck and the cab, and noticed that the tank had been altered. When Rodriguez tapped the gas tank, it emitted a dull sound, "like there was something in there." Castillo was arrested, the gas tank was removed, and approximately 54 pounds of marihuana were discovered. Petitioner was also arrested. It was later discovered that the license plate on the pickup carrying the marihuana was the same one found in the search of the blue and white truck the day before. The ticket received by Petitioner during the earlier stop was found among Castillo's personal

effects.

Petitioner and Castillo were charged in a three-count indictment with (1) conspiracy to import marihuana, in violation of 21 U.S.C. § 963; (2) importing and aiding and abetting in the importation of marihuana, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and 18 U.S.C. § 2; and (3) possessing and aiding and abetting in the possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Both defendants pleaded not guilty, and they were tried jointly.

The jury was selected on June 18, 1990, and trial began on June 21, 1990. On the afternoon of June 20, 1990, the Government provided the defense with investigative notes regarding the stop and search of Petitioner's vehicle on the day before his arrest. Prior to trial on the morning of June 21, Petitioner filed a motion styled "Motion to Suppress or Motion in Limine C." See Appendix D. In the motion, Petitioner sought to suppress the license plate found in the truck on January 30, 1990 and his statements made to the police at that time. The motion to suppress argued that "any evidence obtained by New Mexico State police as a result of the stop and search of Defendant's vehicle on Interstate Highway 25" must be suppressed because the agents "had no reasonable suspicion or probable cause to stop the Defendant's vehicle," and because the stop was "pretextual." *Id.*

The proceedings on the record with regard to the motion to suppress were as follows:

> MR. PEREZ: Robert Perez for Mario Enriquez-Nevarez, we're ready pending the hearing of our motions.
>
> THE COURT: I don't know anything about any motions. What motions do you mean?
>
> MR. PEREZ: We have motions in limine, Your Honor. And yesterday the Government delivered to us some discovery we had not yet seen

> which dealt with the stop of my client's truck as he was heading south on I25, and it became very apparent from the discovery that we had for the first time that the stop was pretextual, so we filed a motion to suppress and/or a motion in limine concerning that stop, Your Honor.
>
> THE COURT: Well, why do you think pretext matters these days? Fifth Circuit changed the law on that.
>
> MR. PEREZ: I didn't run into any Fifth Circuit law, Your Honor. I ran into Eleventh Circuit and Seventh --
>
> THE COURT: What's the name of the case, "Causey"?[1] Is that the En Banc case that says no more pretext stop law?
>
> MR. MACIAS [the prosecutor]: I believe so. But it wasn't a pretext stop. There was a ticket issued.
>
> THE COURT: That's what I mean. If their real secret motive was just to investigate or something, as long as there was an actual event, a violation, and they issued a ticket for it, then that is the end of the story.
>
> MR. PEREZ: It would be one thing, Your Honor, except that the detectives who did the search were out of their jurisdiction at the time, and they had no reason to stop my client so they had a highway patrolman pull him over and then they pulled in behind and did the search.
>
> MR. GONZALES: If I might comment, Your Honor, there is virtual admission in the notes of the officers. The only thing that would make it more specific would be for them to have said that this is a pretext --
>
> THE COURT: Well, you have waited too late to bring all of this stuff up. As far as I am concerned, we're ready for the jury.
> What else do you have? You said something about motions.
>
> MR. PEREZ: May I say something for the record? We were unaware of the circumstances until yesterday afternoon.
>
> THE COURT: I have heard all of this before. I don't know why you were unaware of it, but I have heard all of it before -- at some hearing we had in this court, as a matter of fact.

---

[1]An apparent reference to *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc).

MR. PEREZ: Your Honor, what we heard was that they were stopped, but we didn't know where or how it happened and --

THE COURT: You didn't investigate?

MR. PEREZ: We had no way to investigate that, Your Honor. It was in the hands of the Government.

THE COURT: What do you mean you didn't have any way to investigate it? Get serious. You are a clever criminal defense lawyer. You have all kinds of ways to investigate. Don't you have investigators on your staff.

MR. PEREZ: Yes, we do, Your Honor.

THE COURT: All right. That is ridiculous. What other motions do you have? I am getting ready to bring the jury in.

Appendix B. Upon conviction of all three counts, Petitioner was sentenced to twenty-seven months imprisonment and three years supervised release on each count, the sentences to run concurrently.

On appeal, Petitioner argued, *inter alia*, that the district court erred in failing to conduct a hearing on his motion to suppress. Petitioner contended that his motion was not untimely, because he had been provided with discovery giving rise to the motion on the eve of trial. He further argued that Fifth Circuit precedent on pretextual seizure law did not foreclose his motion.

The Fifth Circuit disagreed. It held that, because Petitioner had not challenged "either the factual basis for the stop, a broken tail light, or the legal authority in New Mexico for a stop on that basis," his allegations did not raise an issue of fact, and "the district court correctly applied *Causey* and did not abuse its discretion in failing to conduct

a hearing on the motion." Appendix A, at 7.[2]

Petitioner also raised a claim that insufficient evidence was presented against him. The Fifth Circuit held that the evidence was sufficient to support the convictions, and specifically found that the ticket issued during the New Mexico stop, and the license plate and statements obtained by the Albuquerque detectives provided substantial evidence of Petitioner's control over the load vehicle, his consciousness of guilt, and his intent to participate in the criminal venture. Appendix A, at 10–12. Rejecting all of Petitioner's contentions, the court of appeals affirmed the convictions. *Id.* at 13.

REASONS FOR GRANTING THE WRIT

There is a split among the federal circuits and the state courts as to whether a pretextual stop violates the Fourth Amendment's prohibition against unreasonable searches and seizures. Even among those jurisdictions taking the majority position—that, under proper circumstances, pretextual stops are constitutional—there are differing opinions as to what constitutes a legal pretextual stop. In the instant case, the Fifth Circuit has construed the pretext doctrine as permissively as possible. In doing so, it has gone beyond the authority supporting such stops found in the language of this Court's precedent and the holdings of prior Fifth Circuit cases. Further, by holding that a hearing on such motions is no longer necessary, it has foreclosed inquiry into a large number of governmental searches

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[2]Defendant also argued that he raised the issue of consent to the search in his motion. The Fifth Circuit found that Defendant had waived this issue by failing to raise it orally before the court. Appendix A, at 6. The Fifth Circuit expressly declined to find that Defendant's pretext argument was untimely raised, resting its holding instead on its view that under *Causey*, a hearing was unnecessary on Defendant's motion. Appendix A, at 7–8 n.2.

and seizures, instead making a categorical ruling regarding "pretext" stops that improperly sanctions a variety of unconstitutional seizures. In order to resolve the conflict among the lower courts, this Court should grant certiorari in this case and clarify when, if ever, pretextual stops by the police are authorized. SUP. CT. R. 10.1.

I. THE FIFTH CIRCUIT FAILED TO FOLLOW THE PRECEDENT OF THIS COURT, AND HAS EFFECTIVELY DETERMINED THAT PRETEXTUAL SEARCHES ARE *PER SE* REASONABLE IN HOLDING THAT HEARINGS ARE NOT NECESSARY ON MOTIONS CHARGING PRETEXT.

In *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932), the Supreme Court held that an "arrest may not be used as a pretext to search for evidence." In *Lefkowitz*, lawful arrests at the defendants' residence pursuant to valid arrest warrants were followed by a general search of the residence during which inculpatory evidence was found. Even though the arrests were clearly valid, they were held to be pretextual and not to warrant the general search of the premises.

Lefkowitz has never been overruled, questioned, or criticized by this Court. Nevertheless, a number of the Court's decisions can be read as weakening *Lefkowitz*'s authority by relying exclusively on objective factors in determining whether the constraints of the Fourth Amendment have been followed. Thus, this Court has repeatedly held that Fourth Amendment analysis ordinarily involves "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Maryland v. Macon*, 472 U.S. 463, 471 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 137 (1978)). *See also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (following *Scott*). In many other cases, there is support for the view that, where an officer has an objectively reasonable basis for making an investigative stop, the officer's motive or actual state of mind

is irrelevant. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court stated that the validity of a brief investigatory stop was to be "judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21–22. Similarly, in *United States v. Cortez*, 449 U.S. 411 (1981), the Court announced that a *Terry* investigative stop will be upheld where "the detaining officers [had] a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 417–18.

The holding in *Scott v. United States* is even more forthright. In that case, the district court found that federal agents had intentionally failed to minimize wiretap monitoring as required by statute.[3] The Court, approving the reversal of the district court's suppression order, agreed with the government's position that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136. Thus, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. Thus, the holdings in *Scott* and *Lefkowitz* appear to be in conflict: the former precludes judicial scrutiny of the motivations of the arresting or searching officer, while the latter holds that illegal motivations, if they are the real reason why a lawful action was taken, may establish a violation of the Fourth Amendment.

The Fifth Circuit has dealt with this conflict repeatedly over the last two decades. Before this Court's ruling in *Terry*, the Fifth Circuit in *Amador-Gonzales v. United States* held

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[3] See 18 U.S.C. § 2518(5) (1976).

that an "arrest must not be a mere pretext for an otherwise illegitimate search." 391 F.2d 308, 313 (5th Cir. 1968). *Terry* did not change the court of appeals' perspective; the court explicitly rejected the inference "that the *Terry* objective 'standard' can be invoked to condone sham or pretextual searches." *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc). Finally, in *United States v. Cruz*, the Fifth Circuit held that the stopping of a vehicle "as a pretext to search for illegal aliens" rendered the evidence seized in the subsequent search inadmissible. 581 F.2d 535, 539 (5th Cir. 1978) (en banc).

The Fifth Circuit overruled *Cruz* in *United States v. Causey*. In the latter case, officers had obtained an arrest warrant for Causey on a charge of failing to appear in court seven years earlier. The warrant was valid, but it was undisputed that the sole purpose for obtaining the warrant was to detain and interrogate Causey about an unrelated crime. The Fifth Circuit panel, relying on *Lefkowitz*, found the arrest to be pretextual and suppressed the fruits of the interrogation. *United States v. Causey*, 818 F.2d 354, 359 (5th Cir.), *on reh'g en banc*, 834 F.2d 1179 (5th Cir. 1987). The en banc court reversed. It held, without reference to *Lefkowitz*, that "where the officers have taken no action except what the law objectively allows their subjective motives in doing so are *not even relevant* to the suppression inquiry." 834 F.2d at 1185 (emphasis added).

Apparently relying on this language, the trial court determined that, because the Albuquerque detectives' actions were objectively legal, the fact that the reason they gave for stopping the truck was pretextual was irrelevant and no hearing was necessary. The Fifth Circuit agreed: it found that, because Petitioner had not challenged either the fact that he had a broken tail light, or the legal authority of the officers to stop cars for broken tail lights,

the officer's motivations were meaningless. Appendix A, at 7.

These interpretations of *Causey*, while arguably supported by its language, run afoul of the constraints of the Fourth Amendment. In this case, evidence presented at trial indicated that the officers followed Petitioner 60–70 miles down Interstate 25 before having him stopped. Although the detectives claimed at trial that they could have stopped Petitioner and cited him for an equipment violation,[4] they elected not to do so, initially in order to see if Petitioner would lead them to contraband, and thereafter for unexplained reasons. As no hearing was allowed, there was no evidence presented that New Mexico law allows highway stops for broken tail lights. Even if state law did allow such stops, however, the officer's actions as described above could only have the purpose of searching for evidence. Thus, even if such a stop would be legally valid in the absence of any other facts, in this case it resulted from an illegal exercise of the officer's discretion to stop the vehicle driven by Petitioner.

Prior to this case, the Fifth Circuit had interpreted *Causey* as precluding certain pretextual stops. In *United States v. Judge*, 864 F.2d 1144 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1946 (1990), the court applied *Causey* to discretionary actions on the part of stopping officers. In *Judge*, Drug Enforcement Administration (DEA) agents conducted a search of bags in the trunk of the defendant's car. The agents argued that once a container was taken into custody, such a search was required for inventory purposes under the DEA manual. The court held, however, that the decision to take a container into custody was discretionary,

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[4]The officers claimed that they had discretionary authority to stop persons for traffic violations; however, they admitted that traffic stops in unmarked police vehicles were discouraged, and explained that this was the reason for contacting the trooper.

and that such a discretionary action must be "viewed from an objective standpoint" in order to determine whether the officers had a "administrative or safety motivation, as opposed to an evidentiary one." 864 F.2d at 1146. As the court stated, "if an objective observer would conclude that the only legitimate purpose for opening a container found in a vehicle could have been to find evidence, the opening of the container was an illegal search." *Id.*

Thus, under *Judge*, pretextual searches were prohibited where it was apparent from the observable facts that the stop was pretextual. Such facts exist in this case, including (1) the length of time the officers followed the truck without stopping it; (2) the detectives' participation in the stop, even though another officer had already effected the stop and was pursuing the ostensibly lawful actions of checking for identification and issuing citations;[5] and (3) the fact that the detectives asked permission to search the truck and accused Petitioner of narcotics smuggling. None of these factors were discussed in the Fifth Circuit's determination that *Causey* applied, nor was *Judge* discussed in the opinion.

The Fifth Circuit's ruling improperly expands the range of police action that may be sanctioned by a technically valid arrest. In holding that a hearing is not even necessary to determine whether a pretextual stop can pass muster under the Fourth Amendment, the Fifth Circuit forgoes objective analysis of the officer's action in favor of a broad, categorical rule that any stop for violation of the traffic laws is *per se* reasonable, no matter how egregious the circumstances or how obvious that the stop was made for ulterior investigative purposes. Although this Court has not overruled *Lefkowitz*, the Fifth Circuit effectively does

[5] *See United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988) (the bounds of a proper highway stop in New Mexico are the request of a driver's license and vehicle registration, running a computer check, and issuing a citation).

so in this case. Because it is possible to harmonize the decisions of this Court without doing violence to the holding in *Lefkowitz*, certiorari should be granted and the Fifth Circuit's opinion reversed.

II. THE COURTS BELOW ARE IN DISARRAY REGARDING THE STANDARDS FOR DETERMINING THE CONSTITUTIONALITY OF PRETEXTUAL SEARCHES.

The implicit conflict between this Court's holdings in *Lefkowitz* and *Scott* is mirrored by the explicit disagreement of the lower courts with regard to the propriety of pretextual searches. Among the federal circuits there appear to be three views as to the validity of pretextual stops. The Ninth Circuit has held that "whether an arrest is a mere pretext to search turns on the motivation or primary purpose of the arresting officers." *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986). This view has been echoed, with varying degrees of consistency, by the Fourth, Eighth and District of Columbia Circuits. *See Warren v. City of Lincoln*, 816 F.2d 1254, 1257 (8th Cir. 1987) ("An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments."), *rev'd on other grounds*, 864 F.2d 1436 (8th Cir.) (en banc), *cert. denied*, 490 U.S. 1091 (1989); *but see United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1991) (inquiry into pretext ends where officer's actions are legally authorized, without regard to motive), *petition for cert. filed*, No. 90–1029 (U.S. Apr. 11, 1991); *United States v. Whitfield*, 629 F.2d 136, 139 n.5 (D.C. Cir. 1980) (dismissing as pretextual government's claim of proper inventory search), *cert. denied*, 449 U.S. 1086 (1981); *McKnight v. United States*, 183 F.2d 977, 978 (D.C. Cir. 1950) (when "the search and not the arrest" was the real motive, "the search is not reasonable within the meaning of the Constitution")

(quoting *Henderson v. United States*, 12 F.2d 528, 531 (4th Cir. 1926) and citing *Lefkowitz*).

Other circuits have held that the test to be applied is an objective one; these "courts do not agree, however, on what objective elements are dispositive in determining whether a pretextual intrusion is unconstitutional." *United States v. Guzman*, 864 F.2d at 1515. The Sixth, Tenth and Eleventh Circuits have applied a "but for" test with regard to pretextual searches: they have held that "the proper inquiry for determining whether a stop is pretextual is 'whether a reasonable officer would have made the seizure in the absence of illegitimate motivation.' " *United States v. Hardy*, 855 F.2d 753, 756 (11th Cir. 1988) (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)), *cert. denied*, 489 U.S. 1019 (1989); *see also United States v. Crottinger*, 928 F.2d 203, 206 (6th Cir. 1991) (following *Smith*); *Guzman*, 864 F.2d at 1517 (same).[6]

Finally, a number of circuits, again with some inconsistency, have adopted a broader, authority-based test: if the officers *could* have stopped the vehicle under state law, then the stop is valid, whether or not a reasonable officer *would* have stopped the vehicle absent the improper motive. See, *e.g.*, *United States v. McCarty*, 862 F.2d 143, 148 (7th Cir. 1988) (motives not relevant where facts give officers probable cause to arrest); *but see United States v. Lewis*, 910 F.2d 1367, 1371 (7th Cir. 1990) (otherwise valid search of automobile will violate Fourth Amendment if stop is merely a pretext for the search); *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir.) (fact that pretext given does not render search invalid),

[6]The decision in *Smith* was based on the Eleventh Circuit's reliance on *Cruz*, which, as a prior Fifth Circuit case, was controlling precedent. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). The Eleventh Circuit has continued to follow *Cruz* despite the new Fifth Circuit's rejection of its earlier decision. *Hardy*, 855 F.2d at 756 n.4.

cert. denied, 484 U.S. 833 (1987); *United States v. Nersesian*, 824 F.2d 1294, 1316 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987) (pivotal factor is whether there exists at the outset a valid basis for the search); *Cummins*, 920 F.2d at 501.

The state courts, though generally favoring objective standards for determining the constitutionality of a search,[7] are in similar disarray on the issue of the objective standard to be applied. Some follow the reasoning of *Causey*, holding that "when police officers do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and not subject to inquiry, and the results of their investigations are not to be suppressed." *People v. Anderson*, 189 Ill. App. 3d 289, 523 N.E.2d 1034, 1040 (Ill. App. Ct. 1988), *cert. denied*, 109 S.Ct. 1935 (1989). *See also Gordon v. State*, 801 S.W.2d 899, 910 (Tex. Crim. App. 1990) (en banc) (following *Causey*); *State v. Jeney*, 163 Ariz. 293, 787 P.2d 1089, 1092 (Ariz. Ct. App. 1989) ("so long as the police do no more than they are objectively authorized and legally permitted to do, their motives in making an arrest are irrelevant and not subject to inquiry"); *State v. Law*, 115 Idaho 769, 769 P.2d 1141 (Idaho App. 1989) (same). Others follow the view of the Eleventh Circuit in *Smith* and the Tenth Circuit in *Guzman*, ruling that "[w]here the police have a dual motive in making an arrest, what might be termed the covert motive is not tainted by the overt motive, even though the covert motive may be dominant, so long as the arrest would have been carried out had the covert motive been absent." *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65, 68 (Ark. 1986); *See*

[7]*But see State v. Vann*, 230 Neb. 601, 432 N.W.2d 810, 813 (Neb. 1988) ("An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments [to the U.S. Constitution].") (quoting *Warren*, 816 F.2d at 1257).

also Brown v. State, 738 P.2d. 1092, 1095 (Wyo. 1987) (same); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc) (same), *cert. dismissed*, 480 U.S. 689 (1987).

It is this latter, "but for" analysis that states the better rule. First, this view harmonizes the prior cases of this Court, as it follows both the prohibition against pretext searches in *Lefkowitz* and the admonition that the courts look to objective standards in *Terry* and its progeny. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944) (continuity in the Court's constitutional decisions is desirable); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (departure from *stare decisis* demands specific justification). Second, the "but for" test for pretextual searches better protects the rights of the ordinary citizen. As the Tenth Circuit explained in *Guzman*, the alternative test proposed by *Causey* is too expansive:

> [A]n objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary intrusions in situations such as traffic stops. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop. To paraphrase one commentator, in the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy and intrusive interrogation when we forget to wear our seat belts, turns on no more than "the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin."

864 F.2d at 1516 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 416 (1974)). On the other hand, unlike the "subjective" or "primary purpose" test, an objective "but for" test can be easily administered on a case-by-case basis without improper and wasteful second-guessing of the officers' motivations by the courts.

Petitioner submits that, under an objective "but for" standard, the officers' stop of his truck was clearly pretextual. The officers followed Petitioner for approximately 30 miles,

initially hoping that he would lead them to a reputed "stash" cite. When this did not occur, they continued to follow him for an additional 30 miles without explaining their purpose. When they still did not see any illegal activity, they contacted a state trooper, who stopped the truck for a broken tail light. They knew that they were outside of their own jurisdiction at the time, and that they were discouraged to make such stops themselves when travelling in an unmarked vehicle. It is clear that, but for the desire to search the truck and question Petitioner, the stop would never have been effected; indeed, after the trooper made the stop, the officers accused Petitioner of drug trafficking and asked permission to search the truck. Under these circumstances, the stop of Petitioner was pretextual, or at least sufficiently suspect to require a hearing to determine its propriety. By foreclosing such hearings in reliance on *Causey*, the Fifth Circuit has impermissibly construed the requirements of the Fourth Amendment.

III. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

This case involves the scope of an exception to the warrant requirement of the Fourth Amendment. The scope of such exceptions have been "specifically established and well-delineated" by this Court, *Horton v. California*, 110 S.Ct. 2301, 2306 (1990), and a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (quoting *Terry*, 391 U.S. at 25–26). In this case, the Fifth Circuit has effectively barred inquiry into those circumstances; as this case shows, under the *Causey* rule, the everyday practice of the district courts is to ignore claims of pretext, no matter how minor the ostensible reason for a stop, how improper the officer's actual motivation, or how unlikely that the stop would have been made without the

existence of an impermissible intent. By failing to even require hearings on pretext claims, the court of appeals has abridged the right of the citizenry to judicial review of the legality of discretionary, and sometimes arbitrary, police actions. Thus, this decision could have serious, detrimental consequences for the administration of constitutional jurisprudence on searches and seizures.

Moreover, the multiple standards applied by lower courts in the "pretext stop" context make it difficult for the officer in the field to conform his actions to constitutional standards, and equally difficult for the ordinary citizen to understand the governmental intrusion to which he may or may not be constitutionally subjected. This confusion should be rectified by a comprehensive statement from this Court. As Senior District Judge Hubert L. Will stated in *United States v. Kordosky*, 878 F.2d 991 (7th Cir. 1989), *vacated on other grounds*, 110 S.Ct. 1943 (1990):

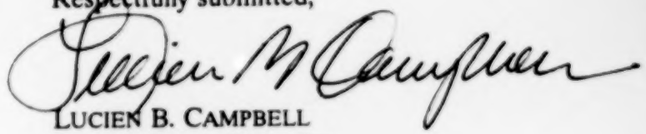
> The result of the "objective" test is clearly inconsistent with the abjuration in *Lefkowitz* that an arrest may not be used as a "pretext to search for evidence." It seems to me that, given the diametrically opposed interpretations of the fourth amendment reflected in the decisions of the various circuits and the frequency with which the issue arises, clarification is badly needed.

Id. at 995 (Will, J., concurring).

CONCLUSION

For the forgoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,



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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8462
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARIO ENRIQUEZ-NEVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 90 CR 53 2(H))

(April 10 , 1991)

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Mario Enriquez-Nevarez was convicted on charges of conspiracy to import marihuana; importing, and aiding and abetting in the importation of, marihuana; and possessing, and aiding and abetting in the possession of, marihuana, with intent to distribute. On appeal, he challenges the sufficiency of the evidence and the district court's refusal to conduct a hearing on his motion to suppress. We AFFIRM.

---

[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On January 30, 1990, two Albuquerque, New Mexico, detectives were conducting surveillance at the residence of Richard Montoya, a known narcotics trafficker. Enriquez went to the residence. The detectives followed him from Montoya's residence to his house, where he stayed for 30-45 minutes. He left his residence, driving a blue van; and the detectives followed him to a motel. Enriquez knocked on a door to one of the motel rooms, but got no response. From the motel, the detectives followed Enriquez to a bar called the Drift-In Lounge. Enriquez and his co-defendant, Rigoberto Castillo-Olivas, left the lounge in the blue van. The detectives followed the van for about half a mile, and then lost sight of it for five to ten minutes. They then observed the van in the same general location where they had lost sight of it; it was driven by Enriquez, and followed by a blue and white pick-up truck with Idaho license plates being driven by Castillo. The detectives followed the van and truck to Enriquez's residence. Enriquez came out of his house carrying a New Mexico license plate. Both men got into the blue and white truck, and Enriquez drove. They went to a video store, back to the residence, and then to a gas station. After they left the gas station, they headed south on Interstate 25. The detectives followed them, thinking that they would go to a "stash" location about thirty miles south of Albuquerque; however, they passed the location and kept heading south.

After following Enriquez and Castillo for about sixty or seventy miles, the detectives had a New Mexico state trooper stop the truck for a broken tail light. The trooper issued a citation to Enriquez for having no driver's license. The detectives then got permission from Enriquez to search the truck. Under the seat, they found a New Mexico license plate, but no narcotics. When the detectives asked if there were any narcotics in the truck, Enriquez replied that people don't take narcotics south; rather, they bring them back from Mexico. Enriquez said that he was going to Juarez to get the bumper on his truck fixed and to buy some soft drinks. The truck did not have a bumper; and, there were several cases of empty soft drink bottles in the back of the truck. However, Albuquerque is approximately 320 miles from Juarez -- the drive takes about four to four and one-half hours.

The next morning, Enriquez drove the blue and white truck to the border crossing from Juarez into El Paso. When questioned at the primary inspection station, Enriquez would not make eye contact with the Customs agent; and his voice started breaking. He told the Customs agent that he had been to Juarez to visit some relatives and to purchase some soft drinks. There were three cases of soft drinks in the back of the truck, but Enriquez carried no luggage. He was sent to the secondary inspection area.

Immediately behind Enriquez in the same lane of the bridge was a white pick-up truck driven by Castillo. In the

gas tank of the white truck, Customs agents discovered fifty-four and one-half pounds of marihuana. The license plate on the white truck was the same license plate that had been found the previous day in the blue and white truck during the stop on Interstate 25 in New Mexico. Also, among Castillo's personal effects was the traffic citation issued to Enriquez that day.

Enriquez and Castillo were indicted for (1) conspiracy to import marihuana, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 963; (2) importing and aiding and abetting the importation of marihuana, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1), and 18 U.S.C. § 2; and (3) possessing and aiding and abetting the possession of marihuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2. The district court denied motions for acquittal both at the close of the government's case-in-chief and at the close of all of the evidence. The jury found both defendants guilty on all three counts. Enriquez timely appealed.

II.

Enriquez contends that the district court erred in failing to conduct a hearing on his motion to suppress evidence obtained from the stop by New Mexico law enforcement officers and that there was insufficient evidence to prove that he knowingly and intentionally participated in a criminal venture. Neither contention has merit.

A.

On June 21, 1990, the day his trial began, Enriquez filed a motion to suppress evidence that was obtained in connection with the above-described January 30 stop by New Mexico law enforcement officers. The district court denied the motion, without a hearing, on the grounds that (1) Enriquez had waited too late to file the motion; and (2) because the officers had an objectively legal reason to stop the truck and issued a citation to Enriquez, their motive for the stop was irrelevant.

An evidentiary hearing on a motion to suppress is required "only when the defendant alleges sufficient facts which, if proven, would justify relief." *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). "Factual allegations set forth in the defendant's motion, including any accompanying affidavits, must be 'sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented.'" *Id.* (quotations omitted). "General or conclusionary assertions, founded upon mere suspicion or conjecture, will not suffice." *Id.* In deciding whether a hearing is necessary, the district court is "left with a certain amount of discretion"; and the determination "is necessarily dependent upon the particular facts which attend a particular request." *Id.* (quotation omitted).

Enriquez contends that the district court erred, because his motion raised the factual issue of whether

Enriquez consented to the search. In his written motion, Enriquez sought suppression of the evidence on the grounds that (1) the stop was pretextual; and (2) he did not knowingly consent to the search. The entire discussion of the consent issue in the motion consisted of the following conclusory statements:

> In addition to the illegal stop, Defendant did not knowingly consent to the search. As such, the detectives had no legal basis to search. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Obviously, such general assertions were wholly insufficient to enable the district court to conclude that a substantial claim was presented.

In any event, the record demonstrates that the district court did not see the written motion prior to its ruling. Immediately prior to opening statements, when Enriquez's counsel brought the motion to the attention of the court, the district judge indicated that he had not seen any written motion. In his oral argument to the district court, Enriquez's counsel contended that the stop was pretextual, but did not argue or raise the consent issue. A defendant's failure to assert a particular ground in support of a motion to suppress "operates as a waiver unless the district court grants relief for good cause shown." *Harrelson*, 705 F.2d at 738. Because Enriquez did not bring the consent issue to the attention of the district court, we hold that the issue was waived. In neither the district court, nor this court, has Enriquez made any attempt to demonstrate "good cause"

for the failure to present the issue to the district court prior to its ruling.

Enriquez also argues that a hearing was necessary because the stop was pretextual. In *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc), this court held that, so long as the police conduct is objectively authorized and legally permitted, the motives of the officers are irrelevant and not subject to inquiry. Enriquez argues that *Causey* does not foreclose his argument, because the district court made an improper assumption that the stop was objectively legal. However, in both his written motion and argument, Enriquez did not challenge either the factual basis for the stop, a broken tail light, or the legal authority in New Mexico for a stop on that basis. Enriquez's conclusory allegations in support of the motion to suppress were insufficient to create an issue of fact with respect to either the factual basis for, or the legality of, the stop. Therefore, we hold that the district court correctly applied *Causey* and did not abuse its discretion in failing to conduct a hearing on the motion.[2]

---

[2] The district court also denied the motion to suppress on the ground that it was untimely. Enriquez's counsel argued that the motion had not been made earlier because key evidence regarding the nature of the stop (the notes of the Albuquerque detectives) was not furnished to him until the afternoon before trial. It is clear, however, that Enriquez was aware of the stop well in advance of the trial. On April 10, 1990, more than two months prior to trial, in its response to Enriquez's motion to sever, the government stated that it proposed "to present testimony about the events in New Mexico on Interstate Highway 25 through a member of the New Mexico State Police." The district court concluded that defense counsel could have investigated the

B.

Enriquez also asserts that the evidence was insufficient to prove beyond a reasonable doubt that (1) he knew of the presence of the marijuana hidden in the truck driven by Castillo; and (2) he intentionally participated in a criminal venture. Of course, in reviewing an insufficient evidence claim, we view the evidence and all reasonable inferences in the light most favorable to the jury's verdict to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. ***Glasser v. United States***, 315 U.S. 60, 80 (1942); ***United States v. Lechuga***, 888 F.2d 1472, 1476 (5th Cir. 1989).

With respect to the conspiracy charge, the government was required to prove beyond a reasonable doubt (1) the existence of an agreement to violate the narcotics laws; (2) knowledge of the conspiracy; and (3) voluntary participation in it. *E.g.*, ***United States v. Rodriquez-Mireles***, 896 F.2d 890, 892 (5th Cir. 1990). An aiding and abetting conviction requires proof beyond a reasonable doubt that the defendant "associated with a criminal venture, participated in the venture, and sought by his action to make the venture succeed." ***United States v. Casto***, 889 F.2d 562, 565 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1164 (1990) (quoting ***United States v. Manotas-Mejia***, 824 F.2d 360, 367 (5th Cir.), *cert. denied*, 484 U.S. 957 (1987)).

circumstances of the stop and filed the motion to suppress in a more timely manner. Based upon our holding, we do not reach this issue.

With respect to the substantive possession charge, the government was required to prove (1) knowing, (2) possession of marihuana, (3) with intent to distribute. ***United States v. Molinar-Apodaca***, 889 F.2d 1417, 1423 (5th Cir. 1989). The importation charge required proof of elements similar to those involved in the possession charge, with the addition of proof "that the defendant played a role in bringing the marijuana from a foreign country into the United States." ***United States v. Williams-Hendricks***, 805 F.2d 496, 500 (5th Cir. 1986).

1.

"Knowledge of the presence of a controlled substance often may be inferred from the exercise of control over a vehicle in which the illegal substance is concealed." ***United States v. Diaz-Carreon***, 915 F.2d 951, 954 (5th Cir. 1990). However, "[p]ossession of or control over a vehicle containing drugs in a hidden compartment does not itself prove guilty knowledge." ***United States v. McDonald***, 905 F.2d 871, 874 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 566 (1990). In such cases, "additional evidence indicating knowledge--circumstances evidencing a *consciousness* of guilt" is necessary. ***Diaz-Carreon***, 915 F.2d at 954 (emphasis in original).

Enriquez argues that an inference of his knowledge of the presence of the marihuana is unwarranted because he did not own or exercise control over the vehicle containing

marihuana, and there is no circumstantial evidence of a consciousness of guilt on his part. We disagree.

On the day before the arrest, Castillo rode with Enriquez from Albuquerque to Juarez in the blue and white pick-up truck. When Enriquez attempted to cross the border the next day, Castillo, driving the white truck in which the marihuana was concealed, was immediately behind him in the same lane of the bridge. The license plate that Enriquez obtained from his residence, and which was discovered in the search of his vehicle on the previous day, was on the white truck. From this circumstantial evidence, the jury could reasonably infer that Enriquez exercised a significant degree of control over the white truck.

There was also substantial circumstantial evidence of a consciousness of guilt on the part of Enriquez. The citation issued to Enriquez for driving without a driver's license on the day before the arrest and seizure was found among Castillo's personal effects when he was arrested. Although Enriquez's association with Castillo and his presence with Castillo and the marihuana at the border crossing is insufficient, standing alone, to show guilty knowledge, it is a factor to be considered. *See United States v. Natel*, 812 F.2d 937, 941 (5th Cir. 1987).

Also, the Customs agent who spoke with Enriquez at the primary inspection station testified that Enriquez would not make eye contact with him and that his voice started breaking during questioning. "Nervous behavior at an

inspection station frequently constitutes persuasive evidence of guilty knowledge." *Diaz-Carreon*, 915 F.2d at 954.

Enriquez's statements to the law enforcement officers also support an inference of guilty knowledge. When the Albuquerque detectives stopped Enriquez the day before the arrest and asked him if there were any narcotics in the truck, he responded that people do not take narcotics south, but instead bring them back from Mexico. At that time, Enriquez told the detectives that he was going to Juarez to get his bumper repaired and to buy some soft drinks--approximately 300 miles away. And, at the inspection station the next day, Enriquez stated that he had gone to Juarez to visit some relatives and to buy some soft drinks. He did not mention his intention to visit relatives to the Albuquerque detectives, nor did he mention the bumper to the Customs agents at the border. Inconsistent statements are "[p]erhaps the strongest evidence of a criminal defendant's guilty knowledge." *Diaz-Carreon*, 915 F.2d at 954-55. Although Enriquez was consistent in his statements regarding the purchase of soft drinks, the implausibility of driving 320 miles from Albuquerque to Juarez to purchase three cases of soft drinks supports a reasonable inference of guilty knowledge.[3]

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[3] During the government's case in chief, one of the Customs agents testified, without objection, that, prior to his referral to secondary inspection, Castillo stated that he had come down to Juarez with "a friend" and that he was taking the white truck back to Albuquerque for that friend.

Although these circumstances, considered separately, might be insufficient to prove guilty knowledge beyond a reasonable doubt, the totality of the circumstances supports an inference that Enriquez knew of the presence of the marihuana hidden in the truck driven by Castillo. *See* ***United States v. Villasenor***, 894 F.2d 1422, 1425-26 (5th Cir. 1990) (quoting ***United States v. Henry***, 849 F.2d 1534, 1537 (5th Cir. 1988)) ("'Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.'").

Enriquez contends that, even if he knew of the presence of the marihuana, there was insufficient evidence to prove either his participation in the conspiracy or that he aided and abetted Castillo in committing the substantive offenses. The same circumstantial evidence that supports a reasonable inference of Enriquez's guilty knowledge also supports an inference that he voluntarily and intentionally participated in the criminal venture.

Enriquez argues that Castillo's statement cannot be considered in evaluating the sufficiency of the evidence, because the district court later instructed the jury that Castillo's statements could be considered only against him, and not against Enriquez. Because we conclude that the evidence is sufficient to sustain Enriquez's convictions, even without considering Castillo's statement, we do not reach whether that statement may properly be considered in evaluating the sufficiency of the evidence.

III.

For the foregoing reasons, the judgment of conviction is

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	NO. EP-90-CR-53H
VS.	Trial Proceedings
RIGOBERTO CASTILLO-OLIVAS MARIO ENRIQUEZ-NEVAREZ	June 21, 1990

Volume 1

A p p e a r a n c e s:

For the Government:	Francisco Macias Assistant U. S. Attorney United States Courthouse El Paso, Texas 79901
For Rigoberto Castillo-Olivas	Ricardo D. Gonzalez Attorney at Law 4621 Pershing Drive El Paso, Texas
For Mario Enriquez-Nevarez	Robert Perez Assistant Federal Public Defender Federal Building El Paso, Texas 79901
Court Reporter:	Chris Carpenter 439 U.S. Courthouse El Paso, Texas

The above styled and numbered cause came on for trial before the Honorable Harry Lee Hudspeth, Judge presiding, with a jury, on June 21, 1990, commencing at 9:00 in the morning, in courtroom number 1, United States Courthouse, El Paso, Texas.

MR. MACIAS: Your Honor, Francisco Macias, representing the United States, we're ready to proceed.

MR. PEREZ: Robert Perez for Mario Enriquez-Nevarez, we're ready pending the hearing of our motions.

THE COURT: I don't know anything about any motions. What motions do you mean?

MR. PEREZ: We have motions in limine, Your Honor. And yesterday the Government delivered to us some discovery we had not yet seen which dealt with the stop of my client's truck as he was heading south on I25, and it became very apparent from the discovery that we had for the first time that the stop was pretextual, so we filed a motion to suppress and/or a motion in limine concerning that stop, Your Honor.

THE COURT: Well, why do you think pretext matters these days? Fifth Circuit changed the law on that.

MR. PEREZ: I didn't run into any Fifth Circuit law, Your Honor. I ran into Eleventh Circuit and Seventh --

THE COURT: What's the name of the case, "Causey"? Is that the En Banc case that says no more pretext stop law?

MR. MACIAS: I believe so. But it wasn't a pretext stop. There was a ticket issued.

THE COURT: That's what I mean. If their real secret motive was just to investigate or something, as long as there was an actual event, a violation, and they issued a

ticket for it, then that is the end of the story.

MR. PEREZ: It would be one thing, Your Honor, except that the detectives who did the search were out of their jurisdiction at the time, and they had no reason to stop my client so they had a highway patrolman pull him over and then they pulled in behind and did the search.

MR. GONZALES: If I might comment, Your Honor, there is virtual admission in the notes of the officers. The only thing that would make it more specific would be for them to have said that this is a pretext --

THE COURT: Well, you have waited too late to bring all of this stuff up. As far as I am concerned, we're ready for the jury.

What else do you have? You said something about motions.

MR. PEREZ: May I say something for the record? We were unaware of the circumstances until yesterday afternoon.

THE COURT: I have heard all of this before. I don't know why you were unaware of it, but I have heard all of it before -- at some hearing we had in this court, as a matter of fact.

MR. PEREZ: Your Honor, what we heard was that they were stopped, but we didn't know where or how it happened and --

THE COURT: You didn't investigate?

MR. PEREZ: We had no way to investigate that, Your Honor. It was in the hands of the Government.

THE COURT: What do you mean you didn't have any way to investigate it? Get serious. You are a clever criminal defense lawyer. You have all kinds of ways to investigate. Don't you have investigators on your staff?

MR. PEREZ: Yes, we do, Your Honor.

THE COURT: All right. That is ridiculous.

What other motions do you have? I am getting ready to bring the jury in.

MR. PEREZ: Your Honor, we have a motion in limine "A" which is basically regular motion dealing with crimes, wrongs or acts. Motion limine "B" is going to deal with the agents' state of mind at the time they were conducting surveillance of my client. I believe the reason for them conducting surveillance are irrelevant to this case and whatever reason --

THE COURT: You're right about this. That can't be quarreled with.

MR. PEREZ: And whatever reasons are irrelevant to this case.

THE COURT: What else?

MR. PEREZ: Motion in limine "C" -- Motion in limine "D," Your Honor, I filed a motion to keep the statements of the co-defendant from being elicited by the

APPENDIX "C"

5-22

UNITED STATES COURT OF APPEALS

FILED

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED

APR 10 1991

GILBERT F. GANUCHEAU
CLERK

No. 90-8462
Summary Calendar

D.C. Docket No. EP 90 CR 53 2(H)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

51141-080

MARIO ENRIQUEZ-NAVEREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before POLITZ, DAVIS, and BARKSDALE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

April 10, 1991

91 9 12:06

U.S. MARSHAL

AAS (OFFICE)

ISSUED AS MANDATE: MAY 02 1991

A true copy of the original, I certify
Clerk, U.S. Fifth Circuit
Deputy

A true copy
Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit
By Marilyn A. Taylor
Deputy
New Orleans, Louisiana
MAY 02 1991

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APPENDIX "D"

Filed 6-21-90

Clerk, U. S. District Court
Western District of Texas

By [illegible] Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	NO. EP-90-CR-53-(2)-H
	)	
MARIO ENRIQUEZ-NEVAREZ	)	

MOTION TO SUPPRESS OR
MOTION IN LIMINE C

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Defendant, Mario Enriquez-Nevarez, by and through his undersigned attorney, and files this Motion to Suppress or Motion in Limine C to suppress or exclude any evidence obtained by New Mexico State police as a result of the stop and search of Defendant's vehicle on Interstate Highway 25.

I

Discovery was provided to the Defendant on June 20, 1990, the day before trial and after jury selection, regarding a stop and search of Defendant's vehicle which occurred on January 30, 1990, on Interstate Highway 25. The discovery provided indicates that Defendant was under the surveillance by New Mexico State detectives. The detectives who were following the Defendant on Interstate 25 had no reasonable suspicion or probable cause to stop the Defendant's vehicle. The discovery indicates that the detectives flagged down a State Highway patrolman to stop the Defendant so that the Defendant's vehicle could be searched. It is clear from the discovery that the reasons for this stop were pretextual. Thus, any evidence obtained from this pretextual stop and search should be suppressed as the evidence was obtained in contravention of the Fourth Amendment of the United States Constitution.

In addition, the statements obtained and observations made by the detectives have no relevance to this case, and the out-of-court statements made constitute hearsay.

Wherefore, premises considered, Defendant requests that the Court exclude such evidence on the grounds that the evidence obtained has no relevance to this case, and the evidence was obtained in violation of the Fourth Amendment of the United States Constitution.

Respectfully submitted,

LUCIEN B. CAMPBELL
Federal Public Defender

Robert J. Perez

ROBERT J. PEREZ, Assistant
Federal Public Defender
Western District of Texas
Federal Building
700 E. San Antonio St., D-401
El Paso, Texas 79901

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was furnished to Francisco Macias, Assistant United States Attorney, Room 353, United States Courthouse, 511 E. San Antonio Street, El Paso, Texas 79901, and to Ricardo D. Gonzalez, Attorney for Codefendant, 4621 Pershing, El Paso, Texas 79903, on this 21st day of June, 1990.

Robert J. Perez

ROBERT J. PEREZ

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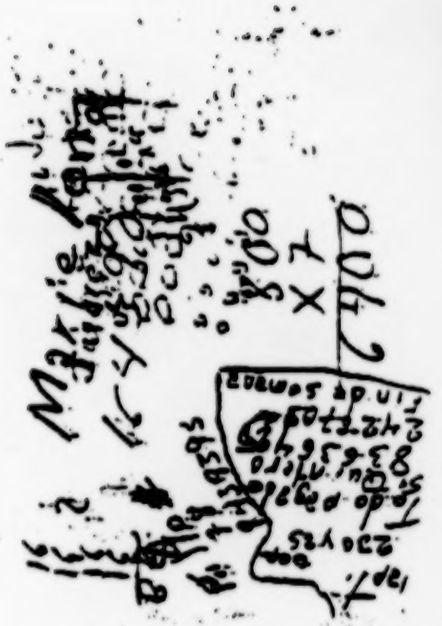
DET STATEMENT/NOTES + PAPERS RECEIVED FROM TINSH

① Detectives observed the vehicle traveling southbound on Interstate 25.
② A state police officer was flagged down for assistance. Vehicle was stopped for having a broken tail light
③. Both subjects were asked to exit the truck. Detective Torres explained why they were stop Detective showed them the defective light
④. Both subjects asked why detectives were at that location... Enriquez was advised that w had information that he had a load of narc and that he sold alot of cocaine is Alb.
⑤ Enriquez advised that people don't take drug to Mexico, but that they [redacted] from the
⑥ Subjects claimed they were going to Juare for bottled cokes and a bumper for his newly painted truck
⑦ Enriquez was asked for permission to search his truck. He agreed to allow detectives to search. Was positive
⑧ During the search of the truck detectives observed a New Mexico truck plate under the seat
⑨ Both subject agreed to a search of their body. Castilla appeared to be nervous while detective spoke to them.

1415 Hrs
Blue Van at
Richard Montoyas
on Bethel
Possible Exchange
Lots of People (N.M.A.)
1445 Hrs
Blue Van
Goes To Eaglewood

1513 Hrs Blue Van
Goes To Ranchland
Motel Parks
S.E. Corner

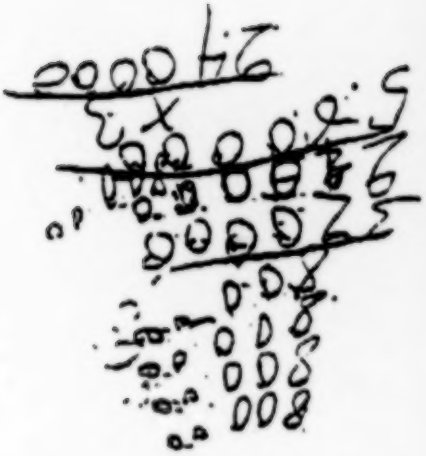
Lost in traffic (Rio Grande)
Blue Truck (Rio Grande)
following Van
1613 Hrs
Blue Van +
Truck Arrive at
Eaglewood.
1632 Hrs
Truck Holding
N.M. Plate Gets
into Truck w/other
Man in Cowboy Hat
1637 Hrs



1517 Hrs
Blue Van State
Police Vehicle
Stopped for No
Tail Light Vehicle
Occupants Were Identified
Identification [illegible]
[illegible]

1415 Hrs
BLUE VAN AT
RICHARD MONTOYAS
ON BETHEL
POSSIBLE EXCHANGE
LOTS OF PEOPLE (N.M.A.)
1445 Hrs
BLUE VAN
GOES TO ENGLEWOOD

1513 Hrs BLUE VAN
GOES TO REGIENCY
MOTEL BACK
S.E. CORNER



(9)

KNOCKS - NO ANSWER
POSSIBLY = 7

1522
BLUE VAN
AT D.I. LOUNGE
PICKS UP S.M.A.
W/COWBOY HAT

BLUE VAN LOSES
LOST IN TRAFFIC

1550 Hrs
VAN FOUND AT

[redacted]

1811 Hrs
ENGLEWOOD STATE
POLICE VEHICLE
STOPPED FOR NO
TAIL LIGHT VEHICLE
SEARCHED NEG RESULTS
IDAHO PLATE [redacted] 15347
N.M. PLATE IN
VEHICLE NM 444-600